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No. 71-877

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

ALFONSO SMITH,
Petitioner,

vs.

STATE OF NEW HAMPSHIRE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

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December 30, 1971

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To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Petitioner, Alfonso Smith, respectfully prays for the issuance of a Writ of Certiorari to review the Order and Decision of the Supreme Court of the State of New Hampshire entered in the above entitled case on June 30, 1971. The aforesaid Order and Decision of the Supreme Court of the State of New Hampshire affirmed a Judgement entered by the Superior Court of Cheshire County, New Hampshire, on November 10, 1969 from which the Petitioner had appealed.

OPINIONS BELOW

The Findings, Ruling and Order of the Superior Court of Cheshire County, State of New Hampshire, on Petitioner's Motion for Reserved Case is annexed hereto as as Appendix A. The opinion of Supreme Court of the State of New Hampshire reported at New Hampshire Adv. Sh. 1971 N. H. , is annexed hereto as Appendix B.

JURISDICTION

The judgment of the Supreme Court of New Hampshire entered on June 30, 1971, is annexed hereto as Appendix C. The jurisdiction of the Court is invoked under (28 U. S. C. 1257 (3)).

QUESTIONS PRESENTED

1. Whether certain testimony admitted during the trial should have been stricken as being unduly prejudicial to the Petitioner.

2. Whether the actions of the County Attorney in soliciting the testimony in question, amounted to a denial to the Petitioner by the State, of the due process of law guaranteed under the Fifth and Fourteenth Amendments to the Constitution.

3. Whether the admission of this evidence against the Petitioner amounted to a denial by the State, through its Court, of the "Equal Protection of the Laws" guaranteed under the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States of America of 1787 and the Amendments thereto, namely Article 5 of the Amendments to the Constitution, which says:

"Due Process of Law"

> "No person shall be . . . deprived of life, liberty or property without due process of law. . ."

In addition, Article 14 of the same document which says:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law; nor to any person within its jurisdiction the equal protection of the laws."

STATEMENT

The Petitioner, Alfonso Smith, along with two other co-defendants, was tried and found guilty of attempted grand larceny of an automobile during the September, 1969, term of the Superior Court of Cheshire County, State of New Hampshire.

On the night of September 13, 1968, Petitioner, along with two companions from Springfield, Massachusetts, were apprehended in the vicinity of a 1963 Cadillac automobile, which led to their indictment and subsequent conviction for the crime of attempted grand larceny.

During the course of the trial, a witness for the State, a Mr. Secord, the manager of the used car lot from which the vehicle had previously been removed, testified for the State. During his examination by the County Attorney, he testified that he had seen two "colored customers" on the lot on the day prior to the alleged attempted theft of the vehicle and had, in fact, spoken to one of them. C. T. Vol. II, p. 43-44. At this time counsel for the Petitioner asked permission to approach the bench to see if there would be some offer of proof by the County Attorney that the witness intended to identify any of the defendants or the Petitioner as the "colored customers" referred to. When it was disclosed by the County Attorney that the witness

could not identify any of the defendants as the colored men referred to on the date in question, counsel for Petitioner requested that the testimony be stricken on the basis that it was unduly prejudicial. C. T. Vol. II, p. 46. At first, the trial Justice agreed to sustain the objection, at which point counsel for Petitioner moved for a mistrial and the trial Justice reversed himself, permitting the admission of the evidence. Counsel for Petitioner took an exception to that ruling and that is the basis of his appeal at this time. C. T. Vol.II, p. 47-54.

The matter was appealed to Supreme Court of New Hampshire which affirmed the judgment of the Superior Court.

REASON FOR GRANTING THE WRIT

The decision of the Supreme Court of the State of New Hampshire is not in accord with applicable decisions of this Court and principles established by it. First it affirmed Petitioner's conviction notwithstanding the fact that he had been denied due process of law in his trial by the actions of the County Attorney in eliciting the prejudicial testimony from the State's witness. Secondly, the action of the trial Justice in permitting the testimony and refusing to order a mistrial, was a denial to the Petitioner of the "equal protection of the laws."

1. The actions of the County Attorney amounted to a denial to the Petitioner of the due process of law. The County Attorney admitted knowing, prior to questioning Mr. Secord, that he would not and could not identify any of the three defendants as the "colored customers" he had spoken with on the lot the day prior to the attempted theft. C. T. Vol. II, p. 45. It is our contention that such testimony without any subsequent

identification, could have but one primary result which would be to unduly prejudice the jury against the Petitioner and his two co-defendants at that time. The County Attorney's actions, coupled with the trial Justice's failure to declare a mistrial or even strike the testimony, we contend, negated any chance defendants might have had of receiving a fair trial from that point on in the proceedings.

We feel that the County Attorney's actions were analogous to those of the Prosecutor in the case of *Mooney vs. Holahon*, 294 U. S. 103, 112, 113, 55 Sup. Ct. 340, 79L Ed. 79L (1935). In that case this Court held that the eliciting of prejudicial testimony by the Prosecutor was a denial of due process of law to the defendant.

We admit that the actions of the County Attorney in this instance are certainly far less reprehensible, however the actions of both men had substantially the same result; that is, they operated to deny the defendant in both cases a fair and unprejudiced trial. The Court reasoned in the Mooney case that since the Prosecutor represented the State, any means employed by him which worked to abrogate the defendant's chances of getting a fair trial, were in effect, a denial by the State of the due process of the law guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution. The Petitioner feels that the Mooney decision governs this case and should be so applied.

2. The admission of Mr. Secord's testimony was a denial to the Petitioner of the "Equal Protection of the Law." "Equal Protection of the Law" is defined in Black's Law Dictionary as follows:

> "The equal protection of the laws of a State is extended to persons within its jurisdiction, within the meaning of the constitutional re-

quirement, when its Courts are open to them on the same conditions as to others, *with like rules of evidence* and modes of procedure, for the security of their persons and property..." (Black's Law Dictionary, 4th Edition, p. 631)

The appellants contend that like rules of evidence were not applied to them in this case. We agree with the Prosecutor's unsupported assertion in this case. that there is a substantially smaller Negro population in the Keene area than elsewhere. C. T. Vol. II, p. 46. However, to say that this makes it permissible for anyone to abandon the rules of evidence that would apply to a Caucasian in the same circumstances, is preposterous. To do this would be to say that if one is a member of a racial minority he is fair play for any type of "rank circumstantial evidence," (C. T. Vol. II, p. 51) as the trial Justice described it. We feel that this is evidence which would have been immediately stricken as being highly prejudicial if proffered against two Caucasian defendants. Therefore, to allow this evidence is not only as we have stated earlier, a denial of due process by the State, but also the equal protection of the law as guaranteed to all citizens by the Fourteenth Amendment to the United States Constitution. *Brown vs. Board of Education of Topeka* 347 U. S. 483, 74 Sup. Ct. 585, 98 L. Ed. 873 (1954).

We do not deny that these men are colored and, if the words used by the witness had been coupled by a subsequent identification of the defendants, then there would have been no problem. We feel that if it had been three white men on trial, then there would have been no allusion to the pigmentation of their skin. We feel that there would merely have been an allusion to *two men* being on the lot on the day prior to the alleged theft, and we feel that if it had been two white men on

the lot on the day prior to the attempted theft who couldn't have been idenified by the witness, that the prosecuting attorney wouldn't have even bothered to try to elicit testimony along these lines. In short, we are saying that it appears that because these men are black and there aren't many blacks in this area of the country, that once again, as has been the case with so many of their race, the defendants were denied the protection that members of other majority groups enjoy without a second thought. It is in effect, if you will, a negative, subtle form of discrimination, but nevertheless, it is discrimination and should not be tolerated in New Hampshire where there are relatively few blacks, any more than in the form of "grandfather clauses" as in the past, in other regions of our nation where blacks are more predominant. We feel that when it results in a conviction, as in this case, that it is a denial of the "Equal Protection of the Law" and should be repudiated by this Court. *Nixon vs. Herndon* 273 U. S. 536 (1927) *Nixon vs. Condon*, 286 U. S. 73 (1932).

We feel that had this case been tried without the use of this prejudicial evidence, the result would probably have been an acquittal for the appellants. There was evidence submitted in the case that the defendants were observed in the immediate area of the vehicle in question. C. T. Vol. II, p. 140, 141. There was other direct evidence which was rather questionable, pertaining to a key to the stolen car, allegedly found in the appellants' vehicle. C. T. Vol. II, p. 170, 174. With this evidence alone, we feel there is serious doubt that any conviction would have ever been returned. However, by permitting testimony that two "colored customers" were on the lot the day prior to the alleged crime, the prosecutor was allowed to paint a picture for the jury

of how he would have them believe the entire crime was perpetrated. It is unfortunate that this was not supported by any identification of the defendants as the subjects in the picture.

The subsequent cross examination by defense counsel in which the witness admitted he could not identify the defendants, could not, we contend, adequately dispel this from the minds of the jury. C. T: Vol. II, p. 56 Added to this, was the fact that the trial Judge made no attempt to instruct the jury to disregard this testimony, either at that time or in his charge. The Appellants contend that the Court erred in not striking that testimony. As a result of this error, we feel that the jury was prejudiced to such an extent that the Appellants were deprived of their right to a fair trial from that point forward.

CONCLUSION

For the foregoing reasons this Petition for a writ of Certiorari to the Supreme Court of the State of New Hampshire should be granted.

Respectfully submitted,

RICHARD R. FERNALD
&
CRISTIANO & KROMPHOLD
Arthur L. Trombly

CERTIFICATE

The undersigned hereby certifies that he is duly admitted to practice before this Court and that he has mailed by first class mail, a copy of the petition for a writ of certiorari to the Attorney General of the State of New Hampshire on the 30th day of December, 1971.

Richard R. Fernald

RICHARD R. FERNALD
Counsel for Petitioner

APPENDIX A

THE STATE OF NEW HAMPSHIRE

Cheshire, SS. Superior Court September Term, 1969

STATE OF NEW HAMPSHIRE

vs.

PHILLIP BLAKE

ALFONSO SMITH

Reserved Case

The Respondents were indicted by the grand jury in and for the County of Cheshire, State of New Hampshire, on a charge of attempted grand larceny on September 13, 1968, of a 1963 Cadillac automobile. Trial by jury resulting in a verdict of guilty. During the course of the trial Respondents seasonably excepted to certain rulings of the Court in admitting and excluding evidence, all of which appears more particularly in the transcript.

After verdict the Respondents seasonably excepted to a denial of their Motions to Set Aside the Verdicts.

These and other exceptions appear more particularly in the transcript and appendix.

All questions of law raised by the foregoing exceptions, or any exceptions appearing in the transcript or appendix are reserved and transferred.

The pleadings, including all Motions with the Court's action thereon, the State's requests for instructions, together with a list of exhibits transferred, are to be printed as an appendix.

Reserved and transferred.

Richard P. Dunfey
Presiding Justice

November 20, 1969

APPENDIX B

Cheshire

NO. 6190.

STATE

vs.

PHILLIP BLAKE

ALFONSO SMITH

June 30, 1971

Warren B. Rudman, Attorney General, and Henry F. Spaloss, Assistant Attorney General (Mr. Spaloss orally), for the State.

Cristiano & Kromphold and Arthur L. Trombly (Mr. Trombly orally) for the defendants.

GRIFFITH, J. Defendants were convicted of attempted larceny of a 1963 black Cadillac automobile owned by Fairfield Motors, Inc. During the trial Donald Secord, sales manager of Fairfield Motors, testified that the day before the crime he observed two colored men on Fairfield's lot where the Cadillac was kept and talked with one of them. He testified they used a small white or off-white car of Chrysler manufacture and that a Dodge is a Chrysler product. The defendants were both black and when arrested were using a white Dodge. Secord did not identify either of the defendants as being the men he had seen on that occasion. Defendants objected to the admission of this evidence and the denial of their motion for mistrial because of its admission. Defendants' exceptions to the admission of this evidence and the denial of their motions for mistrial were reserved and transferred by the Trial Court *(Dunfey, J.)*.

Defendants do not deny the probative value of the evidence. *See State v. Monteiro*, 110 N. H. 95, 97, 261 A.

2d 269, 271 (1970); *United States v. Ravich*, 421 F2d 1196 (2d Cir. 1970). Defendants claim that reference to the two men as "colored" was unduly prejudicial and a denial of equal protection of the law and due process. No argument or authority is advanced in support of this claim and we reject it. The color of the men and the color of the car was relevant and admissible evidence. The description of the men as "colored" is no more prejudicial in these circumstances than the description of the car as white.

Exceptions Overruled.

All concurred.

APPENDIX C

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 6190 State v. Blake the Court upon June 30, 1971, made the following order:

Exceptions Overruled.

Concord, June 30, 1971

By order of the court:
George S. Pappagianis,
Clerk.

APPENDIX D

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In Case No. 6190 State v. Blake the Court upon July 29, 1971, made the following order:

Motion for rehearing denied.

Concord, July 29, 1971

George S. Pappagianis,
Clerk.

Supreme Court, U.S.
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NO. 71-877
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

ALFONSO SMITH
PETITIONER

v.

STATE OF NEW HAMPSHIRE
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEW HAMPSHIRE

BRIEF FOR RESPONDENT IN OPPOSITION

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NO. 71-877
SUPREME COURT OF THE UNITED STATES
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ALFONSO SMITH
PETITIONER

v.

STATE OF NEW HAMPSHIRE
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEW HAMPSHIRE

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the New Hampshire Supreme Court is State v. Blake and Smith, 111 N.H. ____(decided June 30, 1971). Rehearing was denied July 29, 1971.

QUESTION PRESENTED

Is reference to defendant's race an

unreasonable discrimination if the reference has probative value to prove the defendant guilty of the commission of a crime.

STATEMENT OF THE CASE

Petitioner stands convicted of attempted larceny, a felony. RSA 582:3, 590:6. Petitioner stood trial with two co-defendants, one Blake and one Williams, who were also convicted of the same crime.

The crime was committed in Keene, New Hampshire, on September 13, 1968. The property stolen was a 1963 black Cadillac. T. v. II, 14. It was first noticed to be missing from the owner's car lot at about 10:00 p.m. T. v. II, 13, 40, 41. It had not been sold and had a value in excess of $100. T. v. II; 24, 25.

The car was reported stolen and within the hour the police located the car parked in Keene in the parking lot of a place called Riverside Plaza. T. v. II, 14, 15, 17, 60.

The police put the car under surveillance. T. v. II, 66, 69, 70. Shortly after 11:00 p.m. the surveilling officers observed a white Dodge automobile enter the Plaza parking lot, travel slowly through the lot passing the Cadillac and without stopping, exit the lot. Within two minutes the Dodge returned and again began traveling slowly through the lot. This time, however, the Dodge stopped about 12 feet from the Cadillac. The right rear door of the Dodge began to open. Anbther vehicle, a Ford, entered the lot at this time. When it did, the door of the Dodge closed and the Dodge circled the lot and returned to the Cadillac.

The right rear door of the Dodge opened again. This time a man got out and went to the driver's door of the Cadillac. He placed his hand on the door handle and his thumb on the knob. The officers now began to converge

on the scene. The man surmised the presence of the police and ran back to the Dodge, which had begun to move off when the man had gotten out. The man got back into the Dodge. He and the two other occupants of the Dodge were placed under arrest. T. v. II, 70-77, 106-109, 111, 112, 131-142, 163-165.

The three defendants were identified as the occupants of the Dodge. Williams was the driver, Smith the front seat passenger, and Blake the right rear seat passenger. T. v. II, 79, 82, 83, 145. The defendants did not dispute that they were in the Dodge as the State contended them to be. T. v. III, 28, 31, 34, 80, 81, 101, 102, 147, 165. Blake admitted being in the rear right seat of the Dodge. T. v. III, 170. There is also no dispute that Blake did get out of the Dodge. T. v. III, 41, 44, 106, 169.

The Dodge was searched. On the floor

of the Dodge by the rear right seat was found an ignition key for the Cadillac. As aforementioned, this was the area in which Blake had been seated. T. v. II, 75, 88, 95, 96, 120-122, 151, 152, 159.

The defendants are blacks. T. v. II, 45. One Secord, the sales manager of Fairfield Motors, the owner of the Cadillac, testified that on September 12, the day before the crime, he observed two colored men on Fairfield's lot where the Cadillac was kept. Secord further testified that he spoke to one of the men. In his testimony, Secord also said that during his conversation with the first man, Secord did not know where the second man had gone. Finally, Secord testified that the two men used a car which was a white or off-white Chrysler product and that a Dodge is a Chrysler product. T. v. II, 38, 40, 43, 44, 54.

Each of the defendants testified and each uniformly explained his presence in Keene to meet a girl. Blake was to see a girl he knew well, the two remaining defendants were to meet Blake's girl's two sisters. The defendants came from Springfield, and it was a two hour drive to Keene. The defendants claim to have become lost in Keene. The girl Blake said he wanted to see had a telephone and that "almost every night [he] talked to her on the phone". Nevertheless, the defendants did not telephone ahead to make a date or to get directions. Nor during the time the defendants claim to have been lost did they attempt to get to a telephone and call. T. v. III, 31, 32, 39, 73-75, 91, 121, 122, 125, 135, 172, 173.

The evidence which gives rise to appellant's claim of unconstitutionality is the testimony of Secord as to the presence of

the two colored men on Fairfield's car lot the day before the crime. The State offered the evidence as circumstantial evidence of the commission of the crime. T. v. II, 44-53. The defendant does not contest the probative value of the evidence but argues that the mere mention of his race is per se unreasonable discrimination and unduly prejudicial.

ARGUMENT

No useful purpose can be served by granting certiorari. Petitioner concedes before this Court, and had conceded before the Trial Court and the New Hampshire Supreme Court that Keene, New Hampshire, had a "substantially smaller Negro population ... than elsewhere". Petitioner also concedes that "in New Hampshire ... there are relatively few blacks". Petitioner's Brief p. 6,7. The evidence was offered to prove that the Petitioner was at the scene of the crime the

day before the crime was committed and for that purpose the evidence was probative. Characteristics which distinguish one human being from another and serve to identify a particular individual are not excludable evidence merely because the characteristics arise out of race. Stovall v. Denno, 388 U.S. 293. It has never been the law and in a universe such as ours it can never be the law. Indeed lack of due process can flow from not being acutely aware of a defendant's race. United States v. Wade, 388 U.S. 218, Gilbert v. California, 388 U.S. 263, Biggers v. Tennessee, 390 U.S. 404, Foster v. California, 394 U.S. 440.

Assuming the reference to lack probity, what harm has Petitioner suffered? That Petitioner and his co-defendants were black was perfectly obvious to both judge and jury. The evidence gathered at the scene of the

crime was more than sufficient to result in a conviction and it is difficult to see that Secord's testimony as to two unidentified colored men would have made a critical difference in the verdict. Assuming impropriety on the part of the prosecutor, why assume that judge and jury abandon all that is reasonable and responsible and become motivated solely by racial prejudice.

The case does not call for certiorari. No novel points of law are involved and there is no promise that the case can teach significantly either as to principle or administration. The case simply is unimpressive and unremarkable.

Respectfully submitted,

Warren B. Rudman
Attorney General

Henry F. Spaloss
Assistant Attorney General